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AUTHORITIES CITED.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1925.

No. 280.

MISSOURI PACIFIC RAILROAD COMPANY,
APPELLANT,

vs.

THE UNITED STATES.

APPELLANT'S REPLY BRIEF.

Before taking up the Government's brief it is desired to direct attention again to the contention, made in our opening brief, that the provision made in the Act of 1916 for payment to land-aided roads was a mere re-enactment of a similar provision in the Act of 1876, which had been construed for 40 years as inapplicable to payments made for the furnishing of distributing facilities, and that the Act of 1916 should be similarly construed (Section VII, Appellant's Opening Brief, pp. 40-45), a point nowhere discussed in the Government's brief. If so construed, none of the questions raised in the Government's brief are material.

It is true that, literally construed, the 80 per cent provision in the Act of 1916 applies to all services. This, however, was equally true of the Act of 1876. It would be out of place to repeat here the arguments advanced in our opening brief in support of this contention. It is, however, appropriate to direct the Court's attention to the fact that if this contention be sound, then all other questions vanish, since the 80 per cent basis has been undeniably applied to all services performed by the appellant, including the furnishing of distributing space, as distinguished from its prior limitation to payments for transportation only under the earlier and similar statute.

I.

The Petition States a Cause of Action Justiciable in the Court of Claims.

The contention that "this action is in reality an attempt to set aside an order of the Interstate Commerce Commission," and hence is not justiciable in the Court of Claims, is wholly without merit.

The only power delegated to the Commission was to "fix and determine from time to time fair and reasonable rates" for the several classes of service required by the act to be performed, "prescribing the method or methods by weight, or space, or both, or otherwise, for ascertaining such rate of compensation." The reasonableness of the rates thus fixed is not challenged in this suit. With reasonable rates thus established by the Commission, the act itself fixes the basis of pay for

land-grant routes. The Commission was not authorized to fix rates separately for land-grant services nor given any discretion as to the basis of payment therefor. Nor did it attempt to do so. It is true that it interpreted the 80 per cent basis as applicable to all services covered by the act. The determination of this question involves, first, a construction of the Act of 1916, and, second, a determination of appellant's land-grant obligations under the Acts of 1852 and 1853. Neither of these questions is within the administrative discretion of the Commission or call for the exercise of its expert judgment. Its interpretation is binding neither upon the appellant nor the Government. Whether this action is one to set aside an order of the Commission may be tested by considering what the effect of a contrary ruling upon the part of the Commission would have been. Manifestly, if the Commission had held the appellant to be entitled to full compensation for the furnishing of distributing facilities, it would have been open to the Post Office Department to have declined to pay such full compensation upon the ground that under the statute the appellant was entitled to but 80 per cent thereof. In order to have asserted this contention, it would not have been necessary for the United States to have brought an action in the district court to set the order of the Commission aside. It could have declined payment of more than 80 per cent of the compensation accruing for such services, in which event the appellant's remedy would have been to sue in the Court of Claims, whose duty it would have been to have interpreted the Act of 1916 and to

have construed the appellant's land grant. Neither such a suit nor this suit constitutes any attack upon the order of the Commission or upon any ruling within its exclusive and peculiar jurisdiction. The 80 per cent basis derives its sanction from the act itself and not from the Commission, and its proper application, and all questions of law pertinent thereto, are directly justiciable in court, however the question arises.

Since this action involves no attack upon the reasonableness of the rates established by the Commission for general application, all that is said in the Government's brief in relation to the painstaking care which the Commission devoted to the determination of the difficult and complicated questions involved in the determination of reasonable rates or to the "symmetry" of the rates established, is without bearing upon the issue presented.

This suit does not seek any change in the rates fixed by the Commission. It seeks to recover compensation accruing thereunder as reasonable compensation for services, performed under compulsion of an act of Congress, alleged to be outside its land-grant obligations.

Neither Klebe *v.* U. S., 263 U. S. 188, nor U. S. *v.* North American Company, 253 U. S. 330, are pertinent. In the first case, the court held that, since plaintiff had acquiesced in the terms of an express contract, he could not recover on an implied contract for the reasonable value of the property taken. The second case related to compensation for the use of property forcibly taken possession of by an army officer without any authority so to do. The case turned primarily

upon the statute of limitations. The court held that since the army officer had no authority to take possession of the property, the taking did not occur until the occupation was ratified and affirmed by officers duly authorized, but held squarely that as of the time of such ratification the plaintiff was entitled to recover the reasonable value of the property under implied contract.

The claimant in this case has furnished services under compulsion of an act of Congress at the instance of an officer authorized to compel performance. The statute itself provides for the making of reasonable compensation. The appellant seeks to recover the same on the basis of the rates fixed under the statute as reasonable. Its claim is clearly one which is founded both upon a statute of the United States and upon implied contract and over which the Court of Claims had jurisdiction under Section 145 of the Judicial Code. In asserting that the appellant's rights under the statute have been erroneously construed, the appellant is not claiming in violation of the statute but under it. Its contention may be wrong, but the jurisdiction of the Court of Claims to pass upon its contention is clear.

II.

The Arguments Relied Upon in the Government's Brief to Bring the Operation of Railway Post Office Cars Within the Appellant's Land-grant Obligation are Untenable.

The Government does not contend that, judged by the words employed in the grant or the nature of the

services themselves, the furnishing of railway post-office cars is within the land-grant obligation to "transport" the mails. It relies solely upon certain historical facts, which, however, do not support its contentions.

The question is whether the furnishing of railway post-office cars for distribution is within the land-grant obligation. The date when such cars first came into use is placed in the Government brief as 1862 (Government Brief, p. 21), or ten years after the making of appellant's land grant, thus corroborating the allegation in the petition that the use of such cars was unknown at the time. It is, however, contended that in some way train distribution was practiced prior to the installation of railway post-office car service. Since the petition alleges that train distribution was unknown at the time of appellant's land grant, we might rest upon this allegation, as the case is here on appeal from judgment sustaining a demurrer. In addition, the public documents, which must be largely relied on in this connection, support the allegation. The contrary contention of the Government is based solely on certain postal rules and regulations antedating the grants and relating to so-called "route agents." It does not clearly appear from such regulations what were the duties of these route agents and presumably no one now living knows. However, the report of the Postmaster General for 1864 contains the following:

> "For many years the regulations of this Department have required that every post-office should mail letters direct to every other office

> not on the route to *any distributing office*, and that all other letters should be mailed to *the first distributing office* on the route to their destination, involving considerable expense and delays in the transmission of the mails. This subject has been frequently referred to in the reports of this Department. Elaborate distribution schemes have been proposed to improve the existing system, which is still considered defective. * * * *The ordinary distributing post-offices not meeting the necessities of the service, experiments have been commenced with railway or travelling post-offices.*" (Report of Postmaster General, 1864, p. 14—Italics ours.)

After describing these experiments the report goes on to speak of difficulties which will be experienced in making the proposed scheme of distribution effective and of the additional expense which will be involved "until the necessary classification (of offices) is completed and the *railway distribution* organized." This report was made in 1864, over ten years after appellant's land grants.

As stated in the Government's brief, the railway mail service has been the subject of successive congressional investigations, including one made by a congressional joint commission in 1901. Certain findings of this commission are quoted on page 39 of the latest of these investigations, made by the Bourne Commission in 1914 (*Railway Mail Pay, Preliminary Report and Hearings of the Joint Committee on Postage of Second-Class Mail Matter and Compensation for the Transportation of the Mail, 1914*), were set forth on

page 20 of appellant's opening brief and are as follows:

> "*Railway Post-office Cars.*
>
> "*Until a comparatively short time prior to 1873 the distribution of the mails in transit was unknown. Prior to the late sixties the railroads simply transported the mails, which were delivered at the post offices and there distributed.* Accordingly, 'weight' as the basis of compensation, was at the time of its adoption, and long thereafter, entirely adequate.
>
> "For a few years, however, prior to 1873 the distribution of the mails in transit had been practised to a sufficient extent to satisfy the Post Office Department and Congress that it was a desirable innovation and a branch of the Postal service that should be very much enlarged; but it was recognized that *if the railroads were not only to transport the mail itself but also to supply, equip, and haul post offices for the distribution of the mails,* the compensation upon weight basis that had obtained up to that time was not entirely adequate and just, and therefore the law of 1873, as already indicated, contained a provision allowing additional compensation for railway post-office cars. At first these cars were mostly not exceeding 40 or 45 feet in length and of light construction similar to baggage and express cars." (Italics ours.)

Whatever the duties of route agents may have been prior to the use of railway post-office cars, it is clear from these two reports that the use of railway post-office cars and of train distribution, as the term is now understood and as it was used in the Act of 1916,

were unknown at the time of the appellant's land grants in 1852 and 1853. No doubt mails on certain trains were accompanied by agents or caretakers similar to express messengers, who doubtless performed certain limited functions in the handling of the mails on the train. Even without the authority of these reports it should be self-evident that, without the use of the specially equipped post-office cars now in service, which did not come into being until 1862, and the furnishing of which was for the first time made obligatory upon the railroads in 1916, train distribution, as the term is now understood, would have been impossible.

Even were it otherwise, it does not follow that the furnishing of railway post-office cars is within the appellant's land-grant obligation. This would depend, first, upon the terms employed in the grant, interpreted in the light of their ordinary and usual meaning (*Lake Superior & M. R. R. Co. vs. United States*, 93 U. S. 442), and, second, if the words were ambiguous, upon the interpretation placed thereon by the parties at the time.

Under either test the service in question is outside the terms of the grant. The historical facts recited in the Government's brief and from which the contemporaneous interpretation of the parties is to be determined are all against the Government's contention.

By the Government's own admission Congress did not exercise its power to fix the price for the transportation of the mails by land-aided roads until the pas-

sage of the Act of July 12, 1876 (Government Brief, p. 26). Until it exercised this power there was no occasion for either the Government or the carriers to make any distinction as between land-grant and non-land-grant services. When this act was passed all carriers were being paid at weight rates for the transporation of the mails, with additional allowances for the furnishing of railway post-office cars 40 feet in length or over and without distinction as to either service between land-aided and non-land-aided roads. These car allowances were those authorized in the Act of 1873 in recognition of the fact, as stated in the foregoing quotation from the Report of the Joint Commission in 1901, that "if the railroads were not only to transport the mails, but also to supply, equip, and haul post offices for the distribution of the mails, the compensation upon the weight basis that had obtained up to that time was not entirely adequate and just." This itself is a clear recognition that the service was regarded as a separate and additional service. The Act of 1876 provided that land-grant roads should receive but 80 per cent of standard pay. Literally interpreted, it called for the application of the 80 per cent basis to all services performed and for which compensation authorized was to be paid. This is not challenged in the Government brief and, considering the language employed in the act, is not susceptible of challenge. The 80 per cent basis was, nevertheless, limited in its application by the Post Office Department to the weight rates paid for the transportation of the mails. Land-aided railroads, as well as all

others, received 100 per cent of the authorized car allowances and continued so to do down to the establishment of the space basis of pay in 1916. That such was the situation during all of this period is conceded by the Government. From the very inception of land-grant rates the Government thus recognized the furnishing of railway post-office cars as a separate and distinct service not within the land-grant contract and continued so to do for forty years. Otherwise it would have been the duty of the Postmaster General to apply the 80 per cent basis thereto.

The Government seeks to avoid the effect of this contemporaneous construction by pointing out that during the same period distributing facilities were supplied in cars of less than 40 feet in length for which no additional compensation was allowed. This was done both by land-grant and non-land-grant roads. Both could have refused, since mails were then being carried under contract. On the other hand, both could, as they did, waive additional compensation therefor, doubtless for reasons of expediency. To the extent, however, that additional compensation was made for the furnishing of railway post-office cars for use in distribution, it was made to land-grant and non-land-grant carriers alike, at the full rates provided in the act. Although the railroads could and did waive additional compensation for the use of distributing cars less than 40 feet in length, the Postmaster General and other Government officers could not waive or ignore the statutory provision fixing land-grant rates at 80 per cent of those accruing to other carriers. The limita-

tion of the 80 per cent basis during this period to the weight rates for the transportation of the mails cannot, therefore, be explained as a waiver of some assumed right in the Government to apply the same basis to car allowances as compensation for the use of distributing facilities, as is attempted in the Government brief. The payment of full-car allowances to land-grant roads from the inception of land-grant rates to 1916 is consistent only with the theory that the obligation of land-grant carriers to transport the mails at such prices as Congress might fix was interpreted by the administrative officers of the Government as limited to the transportation of the mails and as not including the furnishing of distributing facilities and cannot be otherwise explained.

The historical facts relied on by the Government thus clearly establish a contemporaneous construction of appellant's land-grant obligations of 40 years duration, under which the furnishing of railway post-offices was excluded from such land-grant obligations. If, as erroneously contended by the Government, train distribution was in fact practised at the time of appellant's grant, this contemporaneous construction becomes even more significant.

Even were it otherwise, the appellant is clearly entitled to recover. There can be no pretense that appellant has itself at any time recognized the performance of such service as within its land-grant contract. If all historical considerations, conclusive as they are, be ignored, the words of the grant, the nature of the

service, the terms of the Act of 1916, and all other matters mentioned in our opening brief show, beyond doubt, that the furnishing of distribution space and facilities are not within the land-grant obligations.

III.

The Argument that Because Congress Might have Fixed the Pay for Transportation Space at Less than Eighty Per Cent of Standard Rates, the Appellant, Having Been Paid Eighty Per Cent of Standard Pay for Both Transportation and Distribution Space, has Received Full Compensation for the Latter, is on Its Face Without Merit.

Under the theory set forth in the heading and expounded in Section III of the Government's brief, total pay at full rates is first split as between transportation and distribution space in the relative proportion of each. Full pay for transportation space as thus ascertained is then deducted from the total pay received by the appellant (80 per cent of the entire rate for both services combined) and the remainder is to be deemed to represent pay received for the transportation space, which is subject to land-grant rates. The result is that in a 60-foot standard post-office car the carrier is deemed, under this theory, to have received 16.2 cents per mile for distribution space, or 100 per cent of the pay accruing therefor at standard rates, and 5.4 cents per mile for transportation space (Government Brief, p. 32). The amount thus attributable to transportation space is approximately 46 per cent of

the compensation accruing for such space at standard rates to other carriers. In 30-foot apartment cars, where the distributing space is but 56⅔ per cent of the total space, the carrier under this theory would receive 54 per cent of standard pay and in a standard 15-foot apartment car, where the distribution space is but 46⅔ per cent of the total, would receive 62 per cent of standard pay. Under this theory neither the rate nor the percentage of standard pay which a land-grant carrier receives for transportation space is fixed at all, but depends entirely upon the relation of distributing space to transportation space and varies with every change therein. It decreases with every increase in the proportion of distributing space and increases with every decrease thereof. Under this theory the percentage of standard pay which a land-grant carrier is to receive has not been fixed by Congress at all. It has been left indeterminate, to vary with the proportion of distributing space in railway post-office cars as directed to be furnished by the Postmaster General.

That the Government itself does not contend that land-grant rates have been established by Congress on any such indeterminate basis would appear from the following statement on page 33 of its brief:

> "* * * If Congress had fixed a flat rate for land-grant railroads for strict transportation at 5.4 cents per mile in full 60-foot cars, and the Interstate Commerce Commission had fixed 16.2 per mile for the rest of the car, the result to the company would have been the same. *Of course we do not claim that the Commerce Commission actually figured the rates in*

> *this way,* but we have just as much right to figure them this way in order to sustain the Commission's action, as the plaintiff has to figure them in some other way in order to defeat it." (Italics ours.)

The whole purpose of this method of figuring is to make it appear that the appellant has already received full compensation for distributing space. In accomplishing this purpose, however, the act is given a construction under which no standard of pay whatever for transportation space was established—a construction little short of absurd when the language of the act is considered, especially when construed in the light of the Act of 1876 and its long-continued interpretation.

The suggestion that it is necessary to resort to this ingenious but fallacious theory in order "to sustain the Commission's action" is, of course, wholly without merit. The Commission did not fix rates for land-grant service and was not authorized to do so. It did not divide the pay for railway post-office car service between distributing space and transportation space, nor was it required to do so. It fixed a single rate for both services as a reasonable rate for all carriers. Whatever the decision in this case, that rate stands. It is, indeed, the basis upon which compensation accruing to appellant under its theory of the case rests. As pointed out in our opening brief, the division of a rate embracing both land-grant and non-land-grant services presents no novel problem. It arises constantly in connection with the division of rates for passenger

and freight service over mileage partly land grant and partly non-land grant. If the furnishing of distributing space is not within the land-grant obligation of the carrier, then it is entitled to full compensation for that part of the entire rate accruing from such service and to 80 per cent of the balance. The rate fixed for the combined services should, as pointed out in subdivision VIII of our opening brief (pages 45-57), be divided upon the basis of the physical service performed as in the case of other rates commingling land-grant and non-land-grant services. This especially since the rates established by the Commission were established on a strictly space-rate basis. For further argument in support of this contention, reference is made to the foregoing subdivision in appellant's opening brief.

It is respectfully submitted that the judgment of the Court of Claims should be reversed.

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